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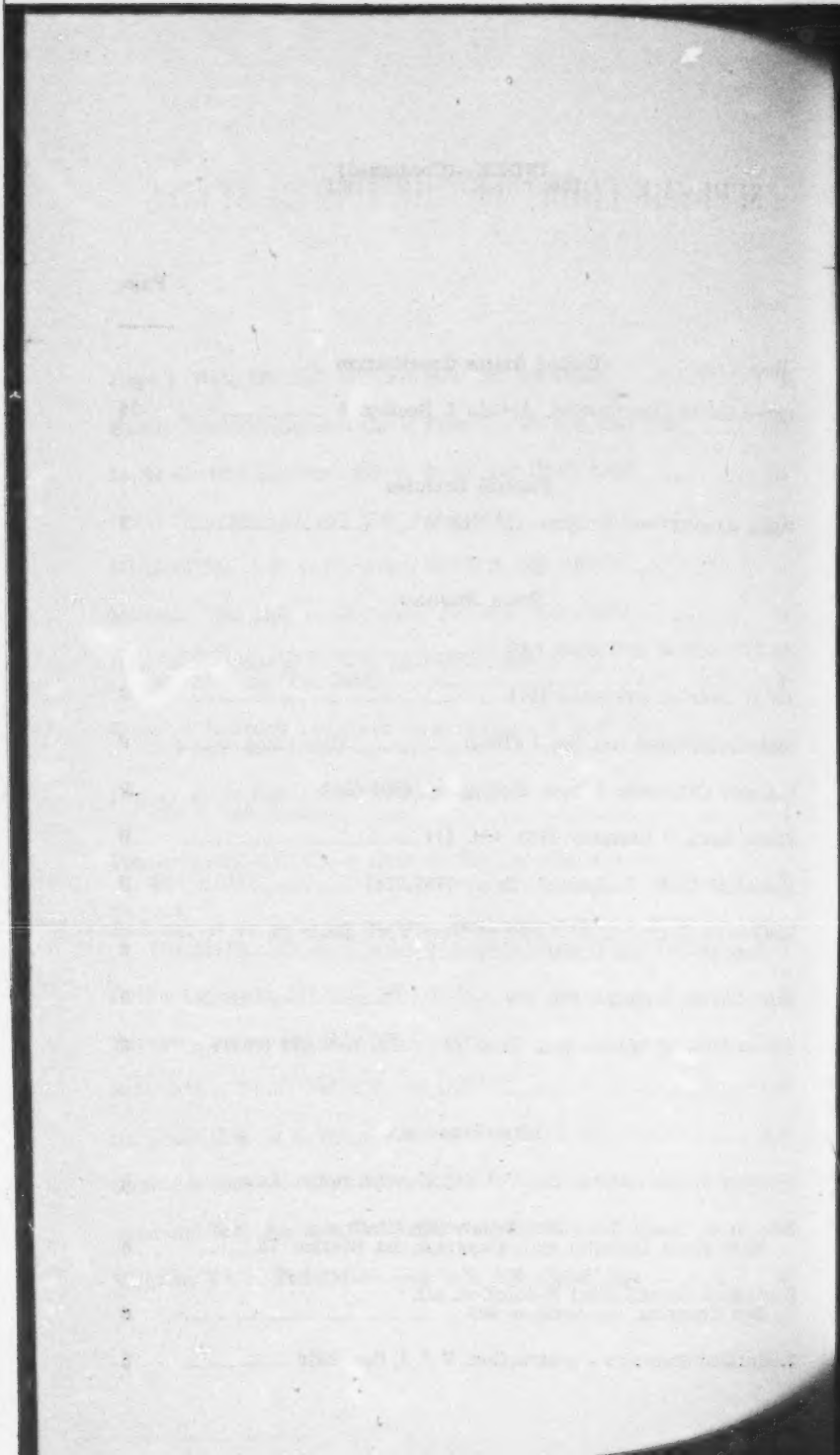

IN THE

SUPREME COURT OF THE UNITED STATES

Nos. 69 & 71 (Consolidated)

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL. ——— *Appellants*

v. No. 69

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL. ——— *Appellees*

and

ROBERT N. HARDIN, PROSECUTING ATTORNEY FOR THE SEVENTH JUDICIAL CIRCUIT OF ARKANSAS, ET AL. ——— *Appellants*

v. No. 71

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL. ——— *Appellees*

ON APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF ARKANSAS

BRIEF OF AMICI CURIAE

OPINION BELOW AND OTHER FORMAL REFERENCES

Both the majority and dissenting opinions of the district court styled as *Chicago R. I. & Pac. R. R., et al.*, v. *Hardin, et al.*, are reported at 239 F. Supp. 1 (E. D. Ark. 1965). Probable jurisdiction was noted and these appeals were consolidated on June 7, 1965.

The amici curiae adopt the references to the jurisdictional aspects, the Federal and State Statutes involved as well as the Constitutional provision which are the subject of this litigation as set forth in the brief submitted by the several appellants.

QUESTION PRESENTED

The sole question treated by the amici curiae is whether the Congress of the United States by enactment of Public Law 88-108 either intended to occupy or so occupied the subject of railroad crew consists as to preempt and deprive the respective states of their authority to legislate matters of safety by means of minimum crew schedules.

STATEMENT OF AMICI CURIAE

This brief is submitted to the Court in behalf of the States by their respective signing Attorneys General pursuant to Rule 42(4) of the United States Supreme Court.

The States joining herein include some of but is not limited to, those which have legislation similar to that of the State of Arkansas which is the subject of this litigation. It is understood by the amici curiae that

at least one interested State has previously submitted and perhaps others may subsequently offer individual comment to this Court.

This participation in this case by the signatory States does not infer, and it is not argued, that the Arkansas statutes are justified, economically sound, or feasible, since no evidence was permitted on this issue during the proceeding in the court below. *Cf. Pennsylvania R. R. Co.* v. *Driscoll,* 330 Pa. 97, 198 A. 130 (1938) and 336 Pa. 310, 9 A. 2d 621 (1939). This brief is thus limited to the broad concept and balance of our federated system of government and seeks merely to offer support to the proposition that safety regulations in the form of minimum railroad crew laws are an established legitimate area of State interest, and that pre-emption of such state statutes by federal law is not favored. *Missouri Pac. R. R.* v. *Norwood,* 283 U.S. 249 (1931) and 290 U.S. 600 (1933).

It is the conclusion and judgment of the amici curiae that where, as here, there was no expressed intent of Congress and Public Law 88-108 is not so comprehensive as to virtually occupy every facet of the field, this Court should hold, consistent with its previous decisions, that the states' authority has not been superseded.

SUMMARY OF ARGUMENT

I

The Police Power Authority of the States Occupies a Preferred Status.

It is well established that states possess the authority to legislate for the health, safety and welfare of their citizens as a legitimate exercise of inherent police power. *Terminal R.R. Ass'n.* v. *Brotherhood,* 318 U.S. 1 (1943). This power is qualified by a criteria of reasonableness and must not run afoul of or conflict with constitutional provisions or prohibitions. *Southern Pac. Co.* v. *Arizona,* 325 U.S. 761 (1945). In this composure, many states have enacted statutes governing the minimum composition of railroad crew consists. These laws are under constant surveilance by both the public and the legislatures. Such statutes undergo alteration or repeal and re-enactment when the circumstances are demanded and justified. In no instance have the states attempted to establish absolute crew compliments, but leave to railroad management or traditional collective bargaining the ultimate determination of road, yard or switching crew composition in excess of statutory schedules.

It is conceded the Congress may validly exercise complete dominion over a subject of interstate commerce, but the statutes under attack here bear judical approval. *Chicago R.I. & Pac. R.R. Co.* v. *Arkansas,* 219 U.S. 453 (1911); *St. Louis, I.M. & S. Ry.* v. *Arkansas,* 240 U.S. 518 (1916); *Missouri Pac. R.R.* v. *Norwood,* 283 U.S. 249 (1931) and 290 U.S. 600 (1933).

The legislative bodies of the several states are peculiarly able and purposely adapted to express the will

and needs of their people by the enactment of proper and remedial legislation.

The laws of the states are clothed with a presumption of validity and on review the courts should not be concerned with the wisdom or expediency of the statute, but should confine their examination to the narrow constitutional issues. *Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960). In the event that federal and state enactments may apparently conflict, every effort should be made to reconcile the two together. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960).

The authority of states is vitally necessary to maintain our treasured system of government and anything which results in deprivation of that power, no matter how small, should be critically reviewed.

II

The Application and the Implications of Public Law 88-108 and the Award Were Expressly Limited.

It is too clear to be arguable that the goal sought to be accomplished which compelled the drastic action of compulsory arbitration was avoidance of a nationwide strike which would have crippled the national economy. In drafting Public Law 88-108, every effort was made by Congress to circumvent a conflict with state enacted minimum crew consist laws. Only the real source of difficulty, the notices of proposed changes in work rules, was ever identified. Public Law 88-108, § 3; R. 77.

If it had been the purpose and objective of Congress to secure an absolute uniform national scheme to super-

sede state statutes and regulations, then most reasonably, interested and vital state officers, commissions or agencies would have been consulted. Moreover, no adequate special studies were made of unique problems existing in the several states.

The legislative history is decidedly in favor of the proposition that state crew statutes were to remain in force and effect. See Hearings on H. J. Res. 565, 88th Cong., 1st Sess. 78; S. J. Res. 102, 88th Cong., 1st Sess. 400. In absence of a clear manifestion, pre-emption will not be implied. *Schwartz* v. *Texas*, 344 U.S. 199 (1952); 1 *Southerland Statutory Construction*, § 2026.

The Award is only binding on the parties. *In Re Certain Carriers*, 229 F. Supp. 259 (D.C.1964). But no state was invited or particiated in the negotiations. Excluding the decision of the district court in this case, there is no judicial determination known which holds that arbitration between unions and management nullifies state statutes and is binding on a state.

III

There Is No Genuine Conflict Between Public Law 88-108 and State Enacted Minimum Crew Requirements.

The supremacy of federal legislation is not invoked unless there is a clear manifestation of legislative purpose to supersede state law. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). If the federal act is so comprehensive as to be incompatible with local law, then conflicting state statutes which would frustrate

the purpose of the federal legislation are superseded. *Local 20* v. *Morton*, 377 U.S. 252 (1964).

There is no irreconciable conflict between the Award and the Arkansas statutes for the spirit of the Award does not prohibit the employment of additional trainmen that might be required by state statutes or the desire of railroad management.

ARGUMENT

I

The Police Power Authority of the States Occupies a Preferred Status.

It is a long established and fundamental concept that a state may legislate for the health, safety and welfare of the general public as a legitimate exercise of its inherent police power. *Reid* v. *Colorado,* 187 U.S. 137 (1902); *Terminal R.R. Ass'n* v. *Brotherhood,* 318 U.S. 1 (1943). It may be properly presumed that without exception every state has entered and enacted regulations in a multitude of fields cognizant of their responsibility and obligations to their citizens. See 16 Am. Jur. 2nd, *Constitutional Law* §§ 259 et seq. for cases and annotations. This authority is qualified, of course, by a criteria of reasonableness and must not run afoul of or conflict with constitutional provisions and prohibitions. *Southern Pac. Co.* v. *Arizona,* 325 U.S. 761 (1945); *Savage* v. *Jones,* 225 U.S. 501 (1912).

It need not be emphasized that many states have enacted various safety regulations and particularly have passed minimum crew laws governing the railroad industry. Several such statutes have recently met judicial approval. *New York Cen. R.R.* v. *Lefkowitz,* 259 N.Y.S. 2d 76 (Sup. Ct. 1965) (McKinney's Consol. Laws N.Y. Book 48, §§ 54-a, 54-b, 54-c (1954); *Chicago & N.W. Ry.* v. *LaFollette,* 135 N.W. 2d 269 (Wis. 1965), Wis Stats. §§ 192.25(2), (4), and (4a); *Radrizzi et al.* v. *Louisville and Nashville R.R. Co.,* No. 51172, Illinois Commerce Commission, July 30, 1965 (Illinois Public Utilities Act, § 57).

In some instances, the legislatures have delegated this authority to regulatory commissions and agencies. E.g., Ill. Rev. Stat. 1963, Ch. 111 2/3, par. 61. Even at this time there are perhaps a dozen states that have some form of minimum crew consists enactments.

As might be reasonably assumed, just as other laws require continued scrutiny and supervision, these statutes and regulations directed to the safe operation of railroad traffic undergo alteration and repeal as circumstances and conditions demand. Repealed Miss. Code Ann. §§ 7769-61. The Nebraska legislature repealed full crew requirements on July 26, 1965. In some few instances, the electorate of the states has by popular vote enacted, repealed or retained full crew statutory provisions. As recently as the last general election, North Dakota adopted an initiated measure repealing full crew statutes. Initiated Measure No. 3, North Dakota Stats. Chap. 469. The people of Claifornia took similar action. Deering's Calif. Labor C.A. § 6901-10. On the other hand, Arkansas has rejected an effort to abolish its statutes. Initiated Act No. 1, 1958; *Hope* v. *Hall,* 229 Ark. 407, 316 S.W. 2d 194 (1958).

While considering this facet of state involvement, it is imperative to keep foremost the fact that the state laws and regulations are directed solely to minimum requirements deemed necessary for the safety and welfare of both the railroad employees and the general public. See Exhibits "A" and "B" to complaint, Act 116 of 1907 and Act 67 of 1913, R. 22 and 23. They leave for railroad management or traditional collective bargaining negotiation the ultimate determination of road, yard or switching crew composition in excess of the statutory schedules.

It is not argued, but rather conceded, that the Congress of the United States in its discretion my validly exercise complete authority over a subject of interstate commerce. *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824); United States Constitution, Art. I, § 8; *Virginia Ry.* v. *Federation,* 300 U.S. 515 (1936). But this proposition only confirms the theory and argument offered by the amici curiae. The different provisions of statutes, the many judicial pronouncements and other matters prominent in the history of minimum railroad crew requirements have not resulted from zealous legislatures or careless tribunals. On the contrary, the propriety and validity of governmental regulations are founded upon compelling logic and reason which have been critically surveyed from every corner and defies criticism. Here, both of the Arkansas acts under attack bear the seal of prior judicial approval. *Chicago, R.I. & Pac. R.R. Co.* v. *Arkansas,* 219 U.S. 453 (1911); *St. Louis, I.M. & S. Ry.* v. *Arkansas,* 240 U.S. 518 (1916).

The right to legislate and govern was placed in each sovereign state as a primary doctrine fostered by the wisdom of the founders of this Nation. It was recognized that each geographical and political area was best able to diagnose and prescribe for its own ills. In this context, there is perhaps no better analogy than the railroad minimum crew law. It is remarkable that at least one state, Hawaii, and some territories such as Guam and the Virgin Islands do not have any railroads. Other states have but one main line with little traffic, while still others may have their entire economy bound by an immense railroad complex of traffic and mileage. Severe or moderate weather may be a substantial factor of consideration. Both terrain and the density of population deserve prominent attention. Even past evils, deaths and disaster

may prompt governmental inquiry and legislative action. As stated previously, safety to the railroad employee and for the general public must each be weighed, but on separate scales. Except as a collateral matter, the states are not persuaded by annual profits or the number of jobs in the railroad industry. Rather, the general welfare of the entire community is the compelling accomplishment which is sought. In all of these matters of consideration mentioned and others too numerous to relate, the legislative bodies are peculiarly able and purposely adapted to investigate, be knowledgable, and competent to express the will of their people and enact proper and remedial legislation. It is against this background that both the state and federal judiciaries have adhered to the principle that enactments of the legislature are presumed to be valid and have strived, in the event of two apparent conflicting statutes, to construe them in *pari materia*. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960).

Also, when viewed in this perspective, it is understandable that the courts have properly refrained from evaluating the wisdom or expediency of the statute under review, and have confined examination to the narrow constitutional issues. *Cf. Order of Railroad Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960).

The rights and authority so necessary to the continued vitality of our unique and treasured duel system of government, nurtured to maturity by time tested principles, should not be eroded away, much more forfeited, on the anemic grounds offered by the district court. State authority should be permitted to stand undiminished as a citadel of local law enacted or repealed by the people and the communities that are greatest affected.

II

The Application and the Implications of Public Law 88-108 and the Award Were Expressly Limited.

The circumstances and conditions which compelled the action of the President of the United States to deliver the message on July 22, 1963, concerning the railroad-labor dispute, and the events subsequent thereto, were meticulously reviewed in the opinion of the court below (R.239-248). For the purposes of this brief, that history can be accepted, but necessarily the conclusions reached are rejected. More important, the circuitous route negotiated by the majority of the district court is challenged as failing to survive close scrutiny. Without reiterating the extensive findings and events, a resume of those most significant matters which culminated in the National Award is beneficial.

It is too clear to be misinterpreted that President Kennedy was compelled to recommend drastic action, in the form of compulsory arbitration, by the unfruitful and disappointing efforts failing to resolve a labor dispute of national magnitude and importance (Pl. Ex. 3, R. 43-45). The singular purpose sought to be served was avoidance of a nationwide strike which would have paralyzed or at least crippled the entire national economy (R.45). It was suggested that:

> " . . . for a 2-year period during which both the parties and the public can better inform themselves on this problem and alternative approaches — interim work rule changes proposed by either party to which both parties cannot agree should be submitted for approval, disapproval or modi-

fication to the Interstate Commerce Commission . . . " (R.48).

Without belaboring this aspect further, it may be unequivocably stated that the tenor of the objective remains as initially established and no variation or alteration can be discerned by subsequent events. Hence, that which precipitated this unique scheme was consistent with the attainment of equitable and enforceable rules.

One important revision of the mechanics of operation was made by the Congress which is pertinent to this litigation. To avoid any possible conflict with state enacted full crew statutes which would have been susceptable to cancellation when confronted with the Interstate Commerce Commission, all reference to the I.C.C. was withdrawn and substituted in its stead was submission of the dispute to an arbitration board (Pl. Ex. 3, Public Law 88-108, § 2, 77 Stat. 132; R.76-78). The command was concise and unambiguous. The board consisted of seven members. The representatives of the carriers and the brotherhoods, each named two persons who jointly, in turn, selected three additional members.

At this juncture it is imperative to note that neither the statement of the President nor the final enactment of Public Law 88-108 contained any language that dictated, or even suggested, abolition of state enacted minimum crew laws. Only the real source of difficulty, the notices of proposed work rules changes, were identified. (Public Law 88-108, § 3, R.77).

It is apparent from the record in this case that no state official participated or was appointed to the Board. (Pl. Ex. 4A, Arbitration Board No. 282; R.80-95). Furthermore, it seems also apparent that no state officer,

commission or agency was ever consulted. No special studies were made of peculiar problems existing within a geographical or political area, and no effort was made to determine possible effect on particular industries, or economies. All data, memoranda and material was furnished by the Secretary of Labor. (Public Law 88-108; § 3; R.77). In fact, only one railroad yard was visited and that was for the purpose of orientation (R. 81). These comments are not directed as a criticism of the Board, for it was not concerned with local or merely sectional problems. To be sure, this could not be accomplished within the ninety day limitation imposed by Congress (Public Law 88-108, § 5; R.77). The Board was only concerned with the gigantic problem of properly arbitrating the differences between railroad management and the unions.

If it had been the purpose and objective of Public Law 88-108 to furnish an absolute national scheme to supersede state statutes and regulations, then most reasonably, interested and vital state commissions, agencies and departments would have been consulted. Thus, from this point alone, it appears entirely clear that the Board was too ill-equipped and uninformed to accomplish any more than resolution of a severe labor-management conflict.

A satisfactory answer is not found by the retort that special boards of adjustment were appointed to consider unique problems. These inquires were not primarily constituted on a basis of health, safety or welfare of the public or the employee, nor were the special boards related in an adequate degree to the problems of dangerous grades, crossings or other persuasive circumstances. In the instance under consideration, three special boards, all composed of the same three members, were concerned

with a huge geographical area. (Pl. Ex. 5; R.174-202). Of this, only mention was made of a switch yard in Paragould, Arkansas (R.182-185), and the fact that a yard at Little Rock was automated (R.199). Such perfunctory treatment is hardly an answer to the question of safety in Arkansas. The other states affected also demand prompt and reasonable response. It cannot validly be presumed that, with the exception of Paragould and Little Rock, Arkansas, the balance of the state is consistent with the national equation of safety. The Rocky Mountain States cannot be logically compared with the Eastern Seaboard any more than the Southwestern States have any physical relation with the West Coast. These are patent fallacies which require the conclusion that except for the most general guides for safe railroad operation, it was thought that all special problems would be left, as had been before, in the capable hands of the respective state governments.

Perhaps most indicative of all, there exists in the Award those provisions granting railroad management certain discretion to fix the size of the crews in excess of the prescribed minimum. Likewise, the local union chairman is granted authority to add additional crewmen not to exceed ten per cent in excess of the Award (Award, II B(2); R.83). Nowhere is there heard the voice of the general public and no mention is made of any discretion given to local government. Perhaps the latitudes provided management and labor can adequately be described as gratuities, but little comfort can be gleamed where there is only a happenstance relationship to safety. This points up once again, most forcibly, that Arbitration Board No. 282 was only seeking to compromise and revise work rule difficulties rather than supplant the various state regulations and statutes.

The legislative history appears to be decidedly in favor of the proposition that the state statutes were to remain in full force and effect. See Hearings on H.J. Res. 565 (Railroad Work Rules Dispute), 88th Cong., 1st Sess. 78; Hearings on S.J. Res. 102 (Railroad Work Rules Dispute), 88th Cong., 1st Sess. 400. There are a few expressions that can be found to the contrary. Hearings H.J. Res. 565, 88th Cong., 1st Sess., pp. 111-114; Hearings before Senate Committee on Commerce on H.J. Res. 565, pp. 400-401. Notwithstanding that a controversy may have existed as to the implications of Public Law 88-108, in the absence of clear language, pre-emption is not implied. *Schwartz* v. *Texas*, 344 U.S. 199 (1952); 1 Southerland Statutory Construction, § 2026.

It was insisted by the appellees before the court below that safety was an expressed factor to be considered by the Arbitration Board (Award; R.82). Perhaps the Board did abide by this admonition, but it must be recognized that local factors and conditions were so varied that it would be indeed fanciful, in absence of some expression of direction, to conclude that the Board seriously entertained the thought, much rather embarked on a program, to occupy every facet of local full crew requirements.

The comments of the members of the Board, made a part of the record on appeal support the conclusion that state laws were not the target of their efforts.

It must be kept foremost that it was the "anachronistic" work rules, not full crew laws, that were the source of dispute and condemned by the majority of the Arbitration Board. Uniformity may be a desirable foundation for collective bargaining arrangements, but the superior dictates of safety cannot be made a slave of unanimity.

Section 3 of Public Law 88-108 provides that the Award is only binding on the carriers and unions. When the validity of Public Law 88-108 was attacked, its application was easily defined, and it was determined constitutional in all respects. *Brotherhood of Locomotive Firemen* v. *Chicago, B. & O. R.R. Co.*, 225 F. Supp. 11 (D.D.C. 1964), Affmd., 331 F. 2d 1020 (D.C.Cir. 1964), cert. den., 377 U.S. 918 (1964). Thereafter, in the case of *In Re Certain Carriers*, 229 F. Supp. 259 (D.C. 1964) it was stated:

> "The Award is final and binding on both sides and must be obeyed by all parties."

The fact that no official or agency of any state government participated is now dramatically brought to focus. Excluding the decision of the lower court, there is no judicial decision known which holds that arbitration between the unions and management nullifies statutes and is binding on a state.

III

There is No Genuine Conflict Between Public Law 88-108 and State Enacted Minimum Crew Requirements.

The majority opinion of the court below found and adjudged that Public Law 88-108, the Award and the conclusions of the special boards of adjustment so totally occupied the subject of railroad crew consists as to preempt state enactments touching this field.

As offered previously, supremacy of federal legislation is not invoked unless there is a clear manifestation of legislative purpose to supersede state law. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). It is recognized that in the absence of such

an expressed intent, if the federal legislation is so comprehensive as to be incompatible with the local law, then necessarily all conflicting state legislation which would frustrate the purpose is superseded by the presence of the federal statutes. *Local 20* v. *Morton*, 377 U.S. 252 (1964). Hence, as in this case, in the absence of any expression on the part of Congress to pre-empt state minimum crew laws and faced with a legislative history replete with disavowals of purpose to supersede state laws, the lower court's decision must rest on the theory that Public Law 88-108 has completely or so substantially occupied the subject of minimum crews as to override all state statutes.

It was argued by the Railroads in the district court that there was an irreconcilable conflict between the Award and the Arkansas statutes. This conflict is urged by appellees to have created a theoretical concept of jeopardy. The majority of the district court accepted the proposition that the Railroads could not comply with the Award and still abide by the requirements of the Arkansas crew consists statutes. It is submitted that this proposition is untenable. Such a conflict is more apparent than real and more contrived than believed. It must be reiterated that the National Award provided for only minimum consists as an arbitrary change of the work rules. The spirit of the arbitration does not prohibit the employment of additional trainmen that might be required by state statutes or the desire of railroad management. In fact, it is incomprehensible to believe that this interpretation would possibly violate the Award.

The lack of depth to the theory of incompatibility is revealed by the two-year termination period provided by Public Law 88-108 (Sections 4 and 8; R.77, 78). The

district court held that the expiration of the Award would not revive the state statutes or provide the states with renewed authority to enact minimum crew statutes. It is understood that at the conclusion of the compulsory arbitration period, the unions and the carriers will be free to negotiate further. There is no assurance, however, of what standards will be used. Furthermore, the Award itself and the entire legislative arbitration complex, can be altered or terminated any time by the agreement of the parties. Hence, even if it may be presumed that the Board, as originally constituted, was concerned with at least the fundamental aspects of railroad safety, which was undoubtedly directed more to the benefit of employees than the general public, this concern, after the expiration of the Award, is to be substituted by purely economic factors, self-help, and collective bargaining. Under these circumstances, it is obvious that the safety and welfare of the national public, if important at all initially, will be relegated to a merely ancillary position in connection with the negotiation and settlement of labor contracts.

CONCLUSION

This litigation has been revealed to be extremely important to each of the states irrespective of current full crew statutes or regulations, for if the decision of the lower court is affirmed, each state will be deprived of its traditional and established authority to enact reasonable safety regulations applicable to the railroad industry. This police power is a precious requisite to enable each state to discharge its obligations for the health, safety and welfare of its citizens. What is even more discouraging, the affirmation of the decision of the district court will set a dangerous precedent threatening virtually every aspect of state governmental authority which touches, though even incidentally, with a concurrent right of the Federal Government.

It is urged that for the several reasons expressed in this amici curiae brief the decision of the court below be reversed so that the delicate balance of State and Federal Government may remain undisturbed each complementing while respecting the other.

November 1, 1965

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